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No. 98-818

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

HAROLD F. RICE,

Petitioner,

v.

BENJAMIN J. CAYETANO, GOVERNOR OF THE STATE OF HAWAII,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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Respondent's brief in opposition provides ample additional evidence -- if any were needed -- of the pernicious effect of the decision below and of the compelling need for plenary review by this Court. In attempting to defend the judgment below, respondent unabashedly relies on the repugnant propositions that States can appropriately use one racial subgroup of citizens as a "proxy" for another, so long as they share a sufficiently similar racial makeup (Opp. 20, 25), and that race-based state action is justified to protect pure "Hawaiian" blood from dilution (Opp. 6, 20 & n.10) -- an amazing claim given that such a call for racial purity has been a constitutionally illegitimate goal since, at the latest, *Loving v. Virginia*, 388 U.S. 1 (1967). Equally illegitimate is respondent's defense of the Ninth Circuit's holding that the existence of one racial classification serves to justify further racial gerrymandering. According to respondent and the court below, such race-based restrictions on the right to vote are not only constitutional, but "common sense good policy." Opp. 14.

That the Ninth Circuit's decision legitimates and provides strong support for such patently offensive notions is the strongest possible evidence that review is warranted in this case. In addition, respondent has offered no persuasive response to petitioner's showing that certiorari is necessary to restore the fundamental guarantees of the Fourteenth and Fifteenth Amendments and to resolve the numerous conflicts between the decision below and this Court's precedents.

I. Respondent's Attempts To Reconcile The Ninth Circuit's Opinion With This Court's Settled Equal Protection Jurisprudence Only Demonstrate The Seriousness Of The Conflict Created By The Decision Below

Respondent's attempts to harmonize the decision below with this Court's equal protection jurisprudence are meritless and rest upon glaringly incorrect assump-

tions. Respondent asserts that facially racial laws are subject to strict scrutiny only upon proof of discriminatory legislative intent. Opp. 29 n.12. To the contrary, however, this Court has repeatedly held that "[n]o inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute." *Shaw v. Reno*, 509 U.S. 630, 642 (1993); *South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966).

Similarly, respondent contends that the decision below is defensible both because the strict scrutiny of race-based laws mandated by *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), applies only to "'affirmative action' type of race based distinctions." Opp. 1, 22. This contention is irreconcilable with this Court's precedent, which makes clear that "the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments," and that "'the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.'" *Adarand*, 515 U.S. at 222, 224 (quoting *Croson*, 488 U.S. at 494); *Shaw*, 509 U.S. at 642-43.

Respondent fails to identify any compelling state interest to support the Office of Hawaiian Affairs ("OHA") racial classification. Respondent offers three purported justifications for race-exclusive voting: (1) "proper management" of trust funds; (2) "bettering the conditions" of the preferred race; and (3) preserving the "culture, tradition, and language of the pre-1778 inhabitants." Opp. 23. The Ninth Circuit endorsed only the first. Pet. App. 17a. None of these interests, however, has ever been recognized as compelling by this Court, and for good reason, because doing so would allow States to discriminate almost at will.

Respondent also wrongly asserts (Opp. 21-22) that States need not consider race-neutral alternatives before enacting race-based laws, and that courts need only

rubber stamp a State's decision to rely on racial categories. This Court, however, requires the governmental entity that *enacts* a race-based law to "carefully examine[] and reject[] race-neutral alternatives" (*Croson*, 488 U.S. at 507), and a reviewing court to conduct a "most searching examination" of the government's decision. *Adarand*, 515 U.S. at 223. The Ninth Circuit could not cure the constitutional defect here by arrogating to itself the legislative function of exploring race-neutral alternatives: "There is no evidence in this record that [the State of Hawaii] had considered any alternatives to a race-based" regime. *Croson*, 488 U.S. at 507. In any event, the court below did not even cursorily examine race-neutral alternatives, despite its acknowledgment that Hawaii had administered the trust lands without regard to race from 1959 to 1978.[1]

Nor has respondent shown that the OHA election laws are narrowly tailored to address any of his proffered state interests. First, "proper management" of a trust does not require racial purity in the OHA electorate. Indeed, the fact that the decision below rests on such an offensive and stereotypical notion conclusively demonstrates the need for this Court's review.[2] Second, if ensuring the "well-being of individual native Hawai-

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1 The court also failed to consider the simple fact that under the Hawaii Admission Act, Pub. L. No. 89-3, § 5(f), 73 Stat. 437 (1959), Hawaii is not required to give any sort of preference to a racial group. Pet. App. 48a ("Such lands, proceeds, and income shall be managed and disposed of for *one or more* of the foregoing purposes . . . .").

2 The outrageousness of this claim is plain from the sort of law it would legitimate. Under respondent's theory, States could ban whites from administering trusts for African-Americans, and vice versa, if limiting trustees to members of only one race is necessary for "proper management" of trusts benefiting members of that race.

ians" is a compelling state interest for equal protection analysis, then strict scrutiny will be reduced to a rubber stamp for racial preferences, because the same could plainly be said of any racial group. Third, even if preservation of the "culture, tradition, and language of the pre-1778 inhabitants" were a compelling state interest, the Constitution would not countenance a link between such an interest and race-based election laws. This Court has already rejected such "political apartheid." *Shaw*, 509 U.S. at 647. Lumping individuals with common ancestors together on the assumption that they "think alike, share the same political interests, and will prefer the same candidates at the polls" is constitutionally impermissible. *Id.*

II. As Respondent's Brief Confirms, The Opinion Below Directly Contradicts This Court's Holding In *Mancari* And Is Inconsistent With Congress's Powers Under The Indian Commerce And Treaty Clauses

Respondent's contention that the racial classification at issue here is justified by this Court's recognition in *Morton v. Mancari*, 417 U.S. 535 (1974), of a "special relationship" between the United States and formally recognized Indian Tribes is fundamentally flawed. Moreover, respondent makes two notable concessions in his discussion of *Mancari*: (1) nothing in the Constitution, and in particular neither the Indian Commerce Clause nor the Treaty Clause, authorizes the racial classification at issue (Opp. 18-19), and (2) "native Hawaiians" and "Hawaiians" cannot qualify as an Indian tribe -- as respondent put it, "[t]he tribal concept simply has no place in the context of Hawaiian history." Opp. 18.

Respondent's entire *Mancari* argument can be summed up in his contention that it "is simply wrong to suggest that *Morton* turned on the unique Indian Commerce and Treaty Clauses of the Constitution. Any careful reading of *Morton* makes clear that the key to *Morton* was the historical special relationship and the

self-governance factors, which apply equally well to Hawaiian history and the voter restriction." Opp. 18-19 (citation omitted). Respondent's reading of *Mancari* is flatly contradicted by the constitutional text and by this Court's opinions in *Mancari* and its progeny, and would wreak havoc on established jurisprudence under the Fourteenth and Fifteenth Amendments.

The Court made clear in *Mancari* and its progeny that the special relationship is limited to members of federally recognized Indian *tribes*, and that classifications based on Indians as a purely racial category would be subject to the same exacting scrutiny as any other racial classification. *See* Pet. 17-20. Since, by respondent's own concession, the racial classifications of "native Hawaiian" and "Hawaiian" cannot satisfy the tribal requirement, they cannot be justified by *Mancari*.[3]

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[3] The court of appeals' opinion also directly conflicts with the holding of *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500-01 (1979), that the "special relationship" does not apply to the States. Respondent's attempts to reconcile this case with *Yakima Nation* are singularly unavailing. Unlike the federal laws in *Yakima Nation*, which were "explicitly designed" to grant the State the authority to undertake the precise regulation of Indians challenged and thus fell within Congress's "plenary power over Indian affairs" (*id.*), nothing in the Hawaii Admission Act or any other federal statute sets aside any portion of the ceded lands trust exclusively for "native Hawaiians" (*see* Hawaii Admission Act § 5(f)) -- let alone for members of any Indian tribe -- and Congress has never attempted to authorize racially segregated voting in OHA elections. Indeed, the Fifth and Fifteenth Amendments would forbid any such attempt. If respondent's reading of *Mancari* were correct, then *Mancari* would be in conflict with *Adarand* and *Croson* and would have to be overruled.

Moreover, any trust relationship created by federal law would be limited to "native Hawaiians," *i.e.*, descendants of pre-1778

In his discussion of *Mancari* and throughout his brief, respondent relies heavily on his unfounded, but oft-repeated, claim that the racial voting restriction for OHA elections merely seeks to promote the goal of self-governance by granting an exclusive franchise in electing OHA trustees to "those people (and their descendants) who were subjects of a formerly independent sovereign nation." Opp. 24. Respondent's "self-governance" mantra, however, is an historically untenable attempt to mask the scheme's blatant racial content.

If, as respondent claims, the OHA election scheme aims to promote self-governance for descendants of all who were subjects of the formerly independent Kingdom of Hawaii, then the relevant date for defining the beneficiaries should be 1893 (the year the Kingdom was overthrown), and not 1778 (the year the first Anglo-Saxon purportedly visited the Hawaiian Islands). Indeed, the choice of year makes clear that race, as opposed to "sovereignty," is the sole factor. The glaring historical fact respondent omits from his brief is that at the time of the overthrow of the Kingdom of Hawaii in 1893, the inhabitants of the Hawaiian Islands descended from pre-1778 inhabitants "constituted less than half of the population. A majority of the inhabitants were non-Native Hawaiians; many of them were born in Hawaii, and many were citizens of Hawaii." Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L.J. 537, 550 (1996); *accord* Hawaiian Almanac and Annual for 1897 at 11, 13 (listing the total population of the Hawaiian Islands in 1890 was 89,990, with full- and partial-blooded Hawaiians accounting for only 40,622).

races that satisfy the 50 percent blood quantum requirement, and could not possibly support the much broader racial classification of "Hawaiians," which is a creation of state law. *See* Haw. Const. art. XII, § 5; Haw. Rev. Stat. § 10-2. Respondent's contention that the State can permissibly use the more racially mixed category of "Hawaiians" as a proxy for the betterment of "native Hawaiians" resurrects the patently offensive notion that it is legitimate for States to categorize voters based on racial stereotypes. *Cf. Shaw*, 509 U.S. at 647.

Thus, to the extent the OHA voting scheme promotes "self-governance," it does so only for a subset of "those people (and their descendants) who were subjects of a formerly independent sovereign nation," *a subset defined exclusively along racial lines*. Indeed, *petitioner himself* is a descendant of subjects of the pre-revolution Kingdom of Hawaii (Pet. App. 6a); the fact that he was nonetheless excluded from voting belies respondent's attempt to clothe Hawaii's racial gerrymander in race-neutral garb. The Ninth Circuit found that Hawaii's laws conditioning the right to vote on the content of one's blood "contain a racial classification on their face." Pet. App. 11a. Respondent does not challenge that finding in his brief, nor could he.

III. As Respondent Appears To Concede, There Is No Support For The Court Of Appeals' Remarkable Holding That *Salyer* Exempts Broad Categories Of Statewide Elections From The Fifteenth Amendment's Prohibition On Race-Based Election Laws

Strikingly, respondent makes no attempt whatsoever to support the Ninth Circuit's erroneous holding that the exception to the *Fourteenth* Amendment's one-person-one-vote rule recognized in *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973), for "special purpose" elections, carves out an exception to the *Fifteenth* Amendment's prohibition of race-based election laws. Thus, respondent appears to concede (Opp. 27-29) that the Ninth Circuit's dramatic narrowing of the Fifteenth Amendment's scope is irreconcilable with this Court's well-settled case law (Pet. 12-16) and is squarely contrary to the unambiguous text of the

Amendment. Given that this unprecedented expansion of the *Salyer* doctrine would shield from close scrutiny any racial restriction on access to the ballot box, so long as those who are permitted to vote are the special objects of attention of the limited-purpose government body for whom they are voting, it is no wonder respondent elected not to defend this portion of the Ninth Circuit's opinion.[4]

Also striking is respondent's concession (Opp. 28-29) that a substantial portion of OHA's funds comes from general tax revenues, in violation of the "substantial effects" prong of *Salyer*. Nevertheless, respondent argues, "although the source of the revenue (from all Hawaii taxpayers) does not demonstrate disproportionate impact, it is beyond dispute that the *expenditure* of the revenue to better the condition of Hawaiians disproportionately impacts Hawaiians." Opp. 29 n.11. Once again, the breadth of the rationale proffered by respondent and the Ninth Circuit is staggering. Any state agency charged with doling out general tax dollars exclusively to a preferred race of citizens would fit respondent's criteria and would therefore qualify for the purported *Salyer* exception to the Fifteenth Amendment. In addition to gutting the Fifteenth Amendment, respondent's analysis is directly inconsistent with *Salyer* itself, where the Court emphasized that "[a]ll of the costs of district projects [were] assessed against land by assessors in proportion to the benefits received" and that

[4] In fact, respondent makes only one substantive reference to the Fifteenth Amendment -- a grossly inaccurate claim that petitioner is required to prove the discriminatory intent of Hawaii's race-based voting restriction. Opp. 29 n.12. Despite this Court's clear holding that discriminatory intent need not be shown when the challenged state action is facially race-based, respondent studiously ignores the court of appeals' admission that "the voter qualification at issue here [is] clearly racial *on its face*." Pet. App. 15a (emphasis added).

because general tax dollars were not used, "there is no way that the economic burdens of district operations can fall on residents *qua* residents." 410 U.S. at 729.

IV. Respondent Fails To Identify A Single Authority To Support The Ninth Circuit's Novel Constraints On Judicial Review

Although all race-based laws are "presumptively unconstitutional" (*Bush v. Vera*, 517 U.S. 952, 976 (1996); *Shaw*, 509 U.S. at 642-43), respondent, citing no authority but the opinion below, argues that this Court must conclusively presume that the facially racial OHA laws are constitutional because petitioner "does not, and cannot," attack them. Opp. 26. Indeed, respondent goes so far as to argue that *Adarand* and *Croson* are irrelevant to this case because they applied the traditional presumption of unconstitutionality for race-based laws, not the novel presumption created by the court below. But the fact that the presumption adopted below is the exact opposite of this Court's teaching in *Adarand* and *Croson* shows that the Ninth Circuit was fundamentally wrong, not that this Court's decisions are irrelevant.

Moreover, this Court has consistently rejected arguments that a party can deprive the Court of authority to consider all laws it deems relevant to a case or controversy. "The contrary conclusion would permit litigants, by agreeing on the legal issue presented, to extract the opinion of a court on . . . dubious constitutional principles, an opinion that would be difficult to characterize as anything but advisory." *United States Nat'l Bank of Oregon v. Independent Ins. Agents*, 508 U.S. 439, 447 (1993).[5] Hawaii cannot insulate its race-based election

[5] Nor is it uncommon for this Court to take unchallenged provisions into account when assessing the constitutionality of challenged statutes. *See, e.g., Riley v. National Federation of*

laws from constitutional challenge merely by lodging them within an interrelated network of other constitutionally flawed racial laws.

At bottom, the decision below stands for the proposition that the existence of one racial classification serves to justify still further racial gerrymandering for the benefit of the same race. That stunning *non sequitur* cannot serve to immunize from judicial review the clearest example of racially discriminatory voting laws that has ever confronted this Court. If the words of the Fifteenth Amendment are to remain more than an empty promise, review must be granted in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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